

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LANCE A. VIOLA,	:	CRIMINAL NO. 99-586
Petitioner,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
Respondent.	:	CIVIL NO. 02-9014

MEMORANDUM AND ORDER

J. M. KELLY, J.

JANUARY , 2003

Presently before the Court is a Motion for Recusal filed by Lance A. Viola ("Mr. Viola") requesting that I recuse myself from further participation in this matter because I previously presided at each of his arraignment, sentencing and revocation of bail hearing, and it would now be impossible for me to preside over his 28 U.S.C. § 2255 Motion Attacking Sentence in a fair and impartial manner. Mr. Viola further alleges that I improperly offered legal advice to the Assistant United States Attorney ("AUSA") assigned to this matter when I suggested, in a written communication that was copied to Mr. Viola's counsel, that the Government should file a brief with the Court in order to preserve an accurate record of the proceedings. For the reasons discussed below, Mr. Viola's Motion for Recusal is **DENIED**.

I. BACKGROUND

At his arraignment on October 4, 1999, Mr. Viola pled guilty to criminal tax charges under § 7201 of the Internal Revenue

Code, a plea that this Court accepted. At a hearing on March 20, 2000, I sentenced Mr. Viola to five months imprisonment and two years supervised release. After a hearing on July 14, 2000, I revoked Mr. Viola's bail as a result of his failure to cooperate with the Government in resolving his tax violations.

Subsequently, on December 11, 2002, Mr. Viola filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. By a personal letter to this Court dated December 13, 2002, which was copied to Mr. Viola's counsel,¹ AUSA John J. Pease ("AUSA Pease") informed this Court and the parties that the Government did not intend to respond formally to Mr. Viola's untimely motion unless directed to do so by the Court. (Ltr. from AUSA Pease to Judge James McGirr Kelly of 12/13/02.) In written response thereto, I suggested that he file a formal response with the Court setting forth his reasons for dismissal of Mr. Viola's motion, instead of submitting a personal letter to chambers. The entirety of my response to AUSA Pease follows:

In your letter of December 13, 2002, you requested direction from the Court as to whether or not the United States Attorney should file a response to the motion recently filed in the above captioned case. I suggest that you do. A personal letter to the Court does not automatically become part of the record. I believe your reasons to seek dismissal of the aforesaid motion should be set forth in a pleading that, not only can be reviewed by the trial Court, but also by the

¹ AUSA Pease's letter indicated that a copy was sent to Paul H. Chappell, Esquire and to David S. Brady, Esquire, both of whom have identified themselves as counsel to Mr. Viola.

Court of Appeals.

The date to respond to the aforesaid motion is 14 days from the date of this letter.

(Ltr. from Judge James McGirr Kelly to AUSA Pease of 12/16/02.)

A copy of my letter was also delivered to Mr. Viola's counsel.

Mr. Viola's counsel do not dispute that they received copies of these letters. Mr. Viola's instant Motion for Recusal followed.

III. DISCUSSION

A. Prior Judicial Proceedings

According to 28 U.S.C. § 455(a), a federal judge is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This rule is limited by the "extrajudicial source" doctrine, which warrants a judge's disqualification where the source of the partiality lies in knowledge gained outside the course of judicial proceedings. See Liteky v. United States, 510 U.S. 540, 554-56 (1994). While a judge may develop predispositions during the course of trial, such occurrences will "rarely" suffice to warrant "bias or prejudice"² recusal. Id. at 554. In a case involving allegations of partiality based, in part, on previous rulings made by the district judge, the United

² Section 455(a) is a "catchall" recusal provision that covers both "interest or relationship" and "bias or prejudice" grounds for recusal. Liteky, 510 U.S. at 548 (citing Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)).

States Supreme Court concluded as follows:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion
Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Id. (emphasis added). The United States Court of Appeals for the Third Circuit agreed, finding that "[b]iases stemming from facts gleaned during judicial proceedings themselves must be particularly strong in order to merit recusal." United States v. Antar, 53 F.3d 568, 574 (3d Cir. 1995).

Whether a judge's impartiality might be questioned is determined in accordance with an objective standard, such that the "focus must be on the reaction of the reasonable observer." Id. at 576; see also Massachusetts School of Law at Andover v. ABA, 107 F.3d 1026, 1042 (3d Cir. 1997) ("The standard for recusal is whether an objective observer reasonably might question the judge's impartiality."). As the Supreme Court elucidated in Liteky v. United States, "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence." Liteky, 510 U.S. at 551 (quoting In re J.P. Linahan, Inc., 138 F.2d 650, 654 (2d Cir. 1943)).

Despite well-settled law in this area, and without more than a mere recitation of the procedural history of his case, Mr. Viola alleges that my participation at his arraignment,

sentencing and bail revocation hearing demonstrate my inability to preside in a fair and impartial manner over his motion attacking sentence. However, both the Supreme Court and the Third Circuit have expressed that rulings in prior judicial proceedings alone almost never warrant a judge's recusal in a subsequent proceeding. Liteky, 510 U.S. at 554; Antar, 53 F.3d at 574. Further, Mr. Viola fails to allege any deep-seated antagonism or favoritism to warrant my recusal nor does he suggest the influence of any extrajudicial events or sources that could give rise to bias or prejudice toward him. In the absence of any evidence supporting Mr. Viola's allegations, I must conclude that no reasonable person reviewing the record could question my impartiality in this matter.

Mr. Viola's allegations of partiality resulting from previous hearings is further undercut by the mandate set forth in the Rules Governing Section 2255 Proceedings for the United States District Courts. See Rules Governing Section 2255 Proceedings for the United States District Courts. It is significant that the Rules specifically provide that the § 2255 motion be presented to the sentencing judge: "The original motion shall be presented promptly to the judge of the district court who presided at movant's trial and sentenced him" Rules Governing Section 2255 Proceedings for the United States District Courts 4(a). Implicit in this Rule is the presumption that the

district judge who presided over the trial should make determinations on collateral attacks of that ruling: "Because the trial judge is thoroughly familiar with the case, there is obvious administrative advantage in giving him the first opportunity to decide whether there are grounds for granting the motion." Id. at advisory committee's notes. As these Rules specifically require the return of the matter on collateral review to the district judge that presided at trial, Mr. Viola's allegations of prejudice or bias grounded merely on my previous rulings are clearly without merit.

B. Correspondence with the Court

Mr. Viola further contends that I breached my duty of impartiality when, allegedly, I improperly offered legal advice and suggested litigation strategies to AUSA Pease in the form of a letter that was also copied to Mr. Viola's counsel. In that letter, I responded to AUSA Pease's inquiry that he should file a formal response to Mr. Viola's motion with the Court. I offered neither legal advice nor litigation strategy. Rather, the letter included a simple admonition that an accurate record of the proceedings should be preserved for review.

Notwithstanding the fact that my letter contained nothing improper, Rule 3(b) of the Rules Governing Section 2255 Proceedings contemplates that such correspondence may take place.

Specifically, the Rule provides that "[t]he filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless ordered to do so by the court." Rules Governing Section 2255 Proceedings for the United States District Courts 3(b). Thus, AUSA Pease's correspondence with the Court and the Court's response thereto suggesting that the Government file a response to Mr. Viola's motion represent a routine practice authorized by the Rules. In light of such authority, no reasonable person could construe this exchange of correspondence as communication that provided the Government with improper legal advice and litigation strategy.

III. CONCLUSION

Upon review of Mr. Viola's Motion for Recusal, which is but a mere recounting of the procedural history of his case and an expression of displeasure with the outcome, I conclude that no reasonable person could call into question my impartiality in this matter. Accordingly, Mr. Viola's Motion for Recusal is **DENIED.**

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O R D E R

AND NOW, this day of January 2003, in consideration
of the Motion for Recusal filed by Lance A. Viola (Doc. No. 21)
and the Response of United States of America (Doc. No. 24)
thereto, it is **ORDERED** that the Motion for Recusal is **DENIED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.